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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN GONZALEZ,

Defendant and Appellant.

B266739

(Los Angeles County
Super. Ct. No. BA409434)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed as modified.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Jonathan Gonzalez was convicted of murdering Brandon Tritschler (Pen. Code,¹ § 187). On appeal, Gonzalez argues that the pattern jury instruction on the crime of murder is legally insufficient and that the trial court abused its discretion when it failed to strike his prior strike conviction. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Gonzalez was charged with the March 26, 2013 murder of Tritschler. It was further alleged that he had used a firearm in the commission of the crime within the meaning of section 12022.53, subdivisions (b), (c), and (d). Gonzalez was also alleged to have committed a prior strike offense within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)). Gonzalez was tried by a jury.

We summarize the evidence presented by the prosecution below. Gonzalez presented no witnesses.

A. Testimony of Sara Chavez

Sara Chavez, Tritschler’s girlfriend,² testified that Gonzalez and Tritschler had once been friendly—Gonzalez cashed fraudulent checks for Tritschler—but their relationship soured when Gonzalez’s bank account was closed as a result. Chavez

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² Chavez testified she was Tritschler’s girlfriend but they were often described as husband and wife.

understood the account closure to be the source of Gonzalez's antipathy toward Tritschler.

A few weeks before the shooting, Gonzalez, in an upset tone, told Chavez to tell Tritschler that he would be "waiting for" him. Chavez related this to Tritschler and cautioned him to be careful. Chavez had previously seen Gonzalez display a gun when he intervened in a disagreement between Tritschler and a man named Manuel Meno in late 2012. Tritschler and Gonzalez were in a fistfight two days before Tritschler was killed.

Chavez was arrested in the evening on March 25, 2013. Tritschler told her he would post her bail.

B. Testimony of Jorge Esquivel

Jorge Esquivel, a friend of Gonzalez, Tritschler, and Chavez, testified that Tritschler called him late on the night of Chavez's arrest. Tritschler and his friend Juan Campos³ picked Esquivel up in Tritschler's car; Esquivel sat in the backseat. Tritschler wanted to find Meno to borrow \$500 for Chavez's bail, and Esquivel thought Meno might be at Gonzalez's house. Campos drove to Gonzalez's home.

Esquivel knew Gonzalez and Tritschler were fighting. Esquivel testified that he "suppose[d]" the issue between the two men to be about Chavez, who had told Esquivel and Tritschler that Gonzalez had made sexual advances toward her.

Esquivel told Tritschler that he would go to the door and knock. Esquivel told Tritschler to wait to one side because he did

³ Esquivel testified that he did not know the friend and did not know his name, but Campos testified that he was the driver of the car.

not want Tritschler and Gonzalez to fight. Esquivel was not afraid to go to the door because he was on good terms with Gonzalez and Meno. Esquivel knew Gonzalez had a rifle because Gonzalez had shown it to him the previous afternoon.

Campos dropped Esquivel off in Gonzalez's driveway and then parked under a tree two houses away. Esquivel, who was under the influence of methamphetamine, knocked on the door and received no response. He walked out to the driveway, unchained Gonzalez's bike, and rode it in circles around the driveway. He knew that Gonzalez and Meno were there, and he wanted them to see that he, Esquivel, was the person knocking.

When Esquivel knocked on the door a second time, Gonzalez came out with a rifle and a bat. Gonzalez pointed the rifle at Esquivel's chest and demanded, "What the fuck are you doing at my house, dude, at this time?" Gonzalez asked if Esquivel had come with Tritschler. Esquivel told him no, that he had come to the house to give Meno his keys. Gonzalez said, "Let's see the keys," and Esquivel showed him some keys. Gonzalez set down the bat, pushed Esquivel with the rifle, and said, "Get over there. Don't move." Esquivel stood against a fence in front of Gonzalez's door.

Gonzalez headed toward Tritschler's car, holding the rifle at his side. The men exchanged words and Tritschler opened the car door. Tritschler did not threaten Gonzalez or display a gun or a knife. Tritschler was unarmed.

Gonzalez shot at the car three or four times. Esquivel, Campos, and Tritschler ran away. Esquivel heard Tritschler making "a really nasty sounding cry out of his throat." Esquivel lost track of Tritschler and Campos as he fled. When he returned to the area, Esquivel saw Tritschler lying on the ground.

Esquivel testified that he was an undocumented immigrant whose deportation had been delayed so that he could testify in this case. On cross-examination, Esquivel testified that he, Meno, and others made money by stealing from houses where Meno's brother performed construction work. He told the police about the shooting when he was arrested.

C. Testimony of Juan Campos

Campos had been friends with Tritschler for a few months before the shooting. After midnight on March 26, 2013, Tritschler telephoned Campos. Tritschler wanted to sell Chavez's car to raise bail money, but because he did not have a driver's license he asked Campos to drive. Campos had a friend who liked to buy cars, but it was too late at night to see him. They drove around to kill time. Campos was willing to drive around all night because he was homeless.

After Tritschler made a phone call they picked up Esquivel, who sat in the backseat. Campos did not know Esquivel and did not speak with him. Esquivel and Tritschler had a conversation about money. Esquivel suggested going to Gonzalez's house. Esquivel and Tritschler agreed that Esquivel would go to the door.

Campos drove the men to the house and parked under a tree. Campos did not remember driving into the driveway, but he might have made a U-turn before he parked. Esquivel exited the car; Tritschler and Campos stayed behind. Campos did not know why Tritschler stayed in the car. To Campos, Tritschler seemed optimistic and sincere in his desire to help his girlfriend. Campos

had no impression that Tritschler was there to hurt Gonzalez. Campos did not know Gonzalez.

Campos could not see where Esquivel went after he left the car, but he later noticed Esquivel in the car's rear-view mirror. Esquivel was looking toward the car with a puzzled or petrified look on his face. Gonzalez approached the front passenger side of the car, aiming a .22 caliber rifle at Tritschler and Campos.

Gonzalez said to Tritschler, "What the fuck are you doing here?" Gonzalez may also have told Tritschler that he was tired of Tritschler coming around. Tritschler responded with something like, "What the fuck are you going to do about it?" By the time of trial Campos could not remember exactly what was said, but he could tell that the two had previously had some kind of disagreement. Tritschler tried to calm Gonzalez down. He did not threaten Gonzalez. Tritschler exhorted Gonzalez to put the gun down so that they could fight "man-to-man." Gonzalez pointed the rifle at Campos and asked who he was. Tritschler said that Campos was just a friend, which Campos understood to be Tritschler communicating to Gonzalez that Campos was not a threat. Tritschler tried to open the door and exit the car, but Gonzalez blocked him. Gonzalez then stepped back and fired a shot through the front window of the car.

Tritschler began to scream and urged Campos to start the car. Scared, Campos opened the car door and ran. Esquivel was running too. Campos glanced back and saw Gonzalez shooting at Tritschler. Campos heard Tritschler scream and plead with Gonzalez to stop. He heard three or four gunshots. Campos testified, "[W]hen these shots were fired and [Tritschler] was screaming loud, this gentleman had a chance to stop. He could have stopped at any given time."

Campos heard Tritschler screaming his name and realized that Tritschler was running behind him. Although Campos heard shots in their direction, he turned back for Tritschler. When Campos reached Tritschler he was still standing, but he was dragging a foot as he moved. Campos could no longer see Gonzalez. He called 911 and stayed with Tritschler until the police and ambulance arrived. Tritschler died in Campos's arms.

The jury listened to a recording of the 911 call. Campos told the dispatcher that he and his friend had been shot by a bald man with a rifle.⁴ He urged the responders to hurry because Tritschler was bleeding from the stomach. Campos said, "He just came to pick me up because he didn't have a license. I was trying. His girl is in jail!"

Campos testified that he had a long criminal history, including convictions for receiving stolen property, possession of a stolen car, and 15 burglaries.

D. Additional Evidence

Detective Leonardo McKenzie testified that there were three bullet holes in Tritschler's car, two in the windshield and one in the front passenger window. One of the bullet holes was consistent with a shooter firing from the front fender area of the car. The police collected three .22 caliber casings from the scene. A box containing .22 caliber bullets was found in the yard of the house next to Gonzalez's, but DNA analysis could not successfully be performed on it.

⁴ Campos later realized he had not been shot.

McKenzie interviewed Campos within hours of the shooting. Campos reported that Tritschler said he was so desperate for bail money that he might be willing to rob someone, but he did not say that he was so desperate for money that he was going to rob Gonzalez. Campos described the circumstances of the shooting: Tritschler was playing music in the car, Campos saw Esquivel standing in the street looking “like something was wrong”; Gonzalez approached the passenger side of the car, saying “What the fuck are you doing here?”; Gonzalez aimed the rifle at Tritschler; Tritschler told Gonzalez to “stop tripping”; Gonzalez shot Tritschler; and Campos fled but turned back when he heard Tritschler screaming. Campos told police that Tritschler urged him to run, not drive away, after the first shot.

Tritschler died of multiple gunshot wounds. The medical examiner who performed the autopsy testified that Tritschler had been shot twice. The fatal shot struck Tritschler on the front right side of the abdomen; the other entered the back of his right leg. The bullet to the abdomen traveled from right to left and downward about 10 degrees, a trajectory consistent with the victim being seated in a car and the shooter standing forward and to the right of the victim. Although the first wound was fatal, a person with that injury would still be able to exit a car and run for a short time. Tritschler also suffered abrasions in the area of the entry wound that were consistent with being hit by shattered glass.

The shooter was probably behind and to the side of Tritschler when he fired the second shot, which struck Tritschler in the back of the leg. The bullet was deformed, indicating that it struck a hard object before entering Tritschler’s calf. He suffered

abrasions on his leg that were consistent with being hit with shattered glass or by particles from the bullet or the ground.

No weapons were recovered from Tritschler's body or car. When Gonzalez was arrested in July 2013, he lied to the police about his name and birthdate.

E. Instructions, Verdict, and Sentencing

The trial court instructed the jury on first degree and second degree murder, self-defense, provocation, and voluntary manslaughter in the heat of passion and in imperfect self-defense. The jury found Gonzalez guilty of second degree murder and found the firearm allegations true. Gonzalez admitted, and the court found true, the prior offense and prior prison term allegations.

The court refused to strike Gonzalez's prior robbery conviction. He was sentenced to 60 years to life in prison, consisting of 15 years to life for the murder, doubled under the Three Strikes law, plus a consecutive sentence enhancement of 25 years to life pursuant to section 12022.53, subdivision (d), and a consecutive enhancement of five years pursuant to section 667, subdivision (a)(1). The court stayed the final enhancement, a one-year enhancement under section 667.5, subdivision (b). Gonzalez was initially awarded 725 days of presentence custody credit; the trial court later amended its order to award him 745 days of custody credit. Gonzalez appeals.⁵

⁵ On September 26, 2016, Gonzalez, through appointed appellate counsel, filed a petition for habeas corpus in this court. We deny the petition by separate order.

DISCUSSION

I. Jury Instructions

Gonzalez argues that he was denied his rights to due process and a fair trial because CALCRIM No. 520, the jury instruction on the elements of murder, did not contain language stating that the prosecution must prove the absence of heat of passion and of imperfect self-defense beyond a reasonable doubt. According to Gonzalez, the lack of this information in the murder instruction itself allowed the jury to convict him of murder without deciding whether the prosecution had met its burden of proof on the absence of heat of passion and the absence of imperfect self-defense.

Gonzalez's argument is without merit. In addition to CALCRIM No. 520, the jury was instructed with CALCRIM Nos. 570 and 571. CALCRIM No. 570 described the legal standard for a sudden quarrel or heat of passion and concluded, "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." CALCRIM No. 571 defined imperfect self-defense and stated, "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder."

Gonzalez argues, however, that various jury instructions likely led the jurors to determine whether he was guilty of murder based only on CALCRIM No. 520 without considering the

burden of proof information in CALCRIM Nos. 570 and 571. There is no reasonable likelihood that the jurors interpreted the instructions in the manner Gonzalez contends. The jury was specifically instructed to “[p]ay careful attention to all of these instructions and consider them together” (CALCRIM No. 200), and nothing in the record suggests that the jury ignored any instructions. In the absence of such evidence, “[w]e presume that jurors are intelligent and capable of understanding and applying the court’s instructions.” (*People v. Butler* (2009) 46 Cal.4th 847, 873.)

II. Request to Strike Prior Offense

Gonzalez asserts that the trial court abused its discretion when it declined to strike his 1997 robbery conviction for the purposes of applying the Three Strikes law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Gonzalez argues that he presented substantial mitigating factors that should have removed him from the spirit of the Three Strikes law, but that the trial court “relied only on Mr. Gonzalez’s criminal history [citation], failing to consider the entire picture, including the peculiar mitigating circumstances of the case, Mr. Gonzalez’s mental state, Mr. Gonzalez’s age, and the sentence he would receive if the strike were struck.” We review the court’s ruling for an abuse of discretion. (*Williams, supra*, 17 Cal.4th at p. 162.)

Gonzalez argued that he should be deemed outside the spirit of the Three Strikes law because he had gone several years without being arrested or convicted after his prior offense and before the instant crime; he was married and was “helping to take care” of his children; he had an abusive father and an unsupportive mother; he had mental health issues and was addicted to drugs; he had, at the time of the incident, been attempting to turn his life around by receiving mental health and substance abuse treatment; he had started school and part-time work; and he had secured housing with assistance from a homeless services provider. He claimed he was “not the one who went after” Tritschler, but was disturbed in his home. He argued that the crime actually was voluntary manslaughter, because he believed he had to defend himself. Gonzalez noted he had not fired his gun immediately and said he only shot Tritschler “after certain steps were taken by the individuals in the vehicle.”

The prosecutor observed that Gonzalez had promptly committed another offense after being released from prison for the 1997 robbery. She argued that Gonzalez did not demonstrate signs of rehabilitation; to the contrary, he appeared to be “deep in the drug scene” and had abandoned his family. The prosecutor

emphasized that Gonzalez chose to leave his house, armed; that he sought Tritschler out; and that he shot him not just once in the car, but again as he fled. She opined that he should have been convicted of first degree murder for this shooting “in cold blood.”

After hearing argument, the court said, “I don’t believe that it would be in the spirit of the Three Strikes law for me to strike the strike in this case. I just—I can’t do it. It’s a violent crime. It happened not so long before the killing in this case that there was a significant period of time that Mr. Gonzalez was swayed to rehabilitation. To the contrary, he displayed criminal behavior and doing an additional crime involving an unlawful driving of a vehicle which again resulted in state prison. So I’m not going to strike the strike.”

The record shows that the trial court was aware of its discretion under section 1385, subdivision (a), and considered the relevant factors, including the arguments presented by Gonzalez, but ultimately determined that striking the prior offense would not be consistent with the spirit of the Three Strikes law. There was no abuse of discretion in this conclusion. Gonzalez was convicted of robbery in 1997 and sentenced to eight years in prison. Released in 2005, he committed vehicle theft (Veh. Code, § 10851, subd. (a)) the following year, leading to another conviction and a 32-month sentence. Gonzalez was discharged from parole in 2011. Less than two years later he murdered Tritschler. As the court noted, Gonzalez had not demonstrated that he was “swayed toward rehabilitation” since the robbery; to the contrary, he committed another crime and returned to prison. Given that Gonzalez twice committed a felony within two years of being released from prison, and that in the instant offense

Gonzalez armed himself with a rifle and left the safety of his home to seek out and confront Tritschler, it was not unreasonable for the trial court to conclude that he was not in fact rehabilitated or outside the spirit of the Three Strikes scheme.

Although Gonzalez interprets the court's comments as a refusal to strike his strike "based on his criminal history alone" without considering other factors, we understand the court's statement as reflecting its conclusion that nothing about Gonzalez, the instant offense, or his prior record suggested he should be deemed "outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.) Gonzalez has argued that a court could have considered him outside the spirit of the Three Strikes law, but he has not established that it was irrational or arbitrary to conclude that he was not outside it. "[A]n appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

III. Stayed Sentence Enhancement

In its respondent's brief, the People argue that the trial court erred when it stayed, rather than striking, the one-year

sentence enhancement under section 667.5, subdivision (b). They are correct. “Once the prior prison term is found true within the meaning of section 667.5[, subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) The failure to impose an enhancement under section 667.5, subdivision (b), or to strike it pursuant to section 1385, subdivision (a), is a jurisdictional error that results in a legally unauthorized sentence subject to correction on appeal. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390-391.)

DISPOSITION

The one-year Penal Code section 667.5, subdivision (b) enhancement is ordered stricken. The superior court is ordered to prepare an amended abstract of judgment as set forth in this opinion and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

MENETREZ, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.